STATE OF MICHIGAN

COURT OF APPEALS

BRIDGET HOWARD,

Plaintiff-Appellee,

v

LUCIA ZAMORANO, M.D., HARPER HOSPITAL, DETROIT MEDICAL CENTER, and UNIVERSITY NEUROLOGICAL ASSOCIATES, P.C.,

Defendants-Appellants

and

JOHN R. JACOBS, M.D., and JOHN RACHEL, M.D.,

Defendants.

UNPUBLISHED
October 14, 2004

No. 244610
Wayne Circuit Court
LC No. 00-016152-NH

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

A jury returned a verdict in favor of plaintiff Bridget Howard against defendants-appellants[1] Lucia Zamorano, M.D., Harper Hospital ("Harper"), Detroit Medical Center ("DMC"), and University Neurological Associates, P.C. ("UNA") with respect to her medical malpractice claims. Defendants filed post-trial motions for judgment notwithstanding the verdict (JNOV), for a new trial, and for remittitur, which the trial court denied. Defendants now appeal, and we reverse and remand.

I. FACTS AND PROCEDURAL HISTORY

[1] Defendants Jacobs and Rachel are not parties to this appeal; therefore, we will refer to defendants-appellants collectively as "defendants" hereafter.

Plaintiff experienced problems with her vision in 1997, and consulted her primary care physician, Dr. Roger Harris. Dr. Harris referred plaintiff to UNA for treatment of her visual problems, where she met with Dr. Zamorano, who is a neurosurgeon specializing in stereotactic surgery and "gamma knife" radiation therapy.[2] Plaintiff was diagnosed with a small (2 cm by 2 cm by 2cm), noncancerous pituitary tumor that compressed the optic chiasm and caused plaintiff's vision problems. Dr. Zamorano quickly rearranged her schedule to perform surgery because plaintiff would be permanently blinded absent surgery. Dr. Zamorano and another neurosurgeon, Dr. George England, met with plaintiff and her friend Tournez Green. Dr. Zamorano testified that she told plaintiff and Green that the first surgery might not remove the entire tumor, and that a second surgery might be required. Plaintiff and Green testified that they were not told this, but also testified that they were told that gamma knife surgery might be required to remove residual tumor that was not removed after the first procedure.

On December 15, 1997, Dr. Zamorano performed the surgery, using a "transphenoidal" approach. Plaintiff's vision improved substantially after the surgery, though it did not return to normal. Plaintiff testified that she did not talk to Dr. Zamorano after the surgery. Green testified that after the surgery, he went into the recovery room, and that Dr. Zamorano told him "[e]verything is fine. The tumor was removed. Everything is fine." Plaintiff testified that Dr. Zamorano visited her at the hospital a couple days after the surgery and "told me she had removed [the tumor] completely." Green also testified about the meeting with Dr. Zamorano, and said that there was some residual tumor, and that the gamma knife procedure would need to be done to treat it. However, according to plaintiff, she found out a few days afterwards that Dr. Zamorano had not completely removed the tumor. A follow-up magnetic resonance imaging (MRI) scan showed that the tumor had not been removed completely. One of plaintiff's physicians took the MRI to DMC's tumor board, which recommended that plaintiff have a second surgery to remove the residual tumor, and recommended against the gamma knife procedure. Dr. Zamorano advised plaintiff that she had reviewed the tumor board's recommendations, and that it was up to plaintiff whether she wanted a second surgery, or for Dr. Zamorano to proceed with the gamma knife procedure.

Plaintiff testified that after the surgery she returned to work at the Postal Service in July 1998. Plaintiff stated that her vision was not as good after the surgery as it was before she started having vision problems before the surgery. However, plaintiff also testified that "after the surgery, the vision was improved, so it was really like I couldn't ga[u]ge it against my vision beforehand." Plaintiff stated that since the surgery, she has been in three car accidents, including one in which she was hit and two in which she hit the cars in front of her because she had problems with her vision. Plaintiff also fell down the stairs at home and broke one of her vertebrae when she misjudged the steps. According to plaintiff, she experiences the rapid movement of her visual field and visual tremors. Plaintiff testified that before her surgery, she was never told that she might have visual tremors or that her vision would be cloudy or that she

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[2] Stereotactic surgery is surgery performed with the assistance of some form of imaging technology to help guide the surgeon during the procedure. The gamma knife procedure involves targeting radiation to a small area for tumor removal.

might be clumsy and uncoordinated as a result. According to plaintiff, she eventually decided to see a doctor about treatment for the tumor, but the neurosurgeon to whom she was referred "said that he didn't do surgery in that area of the brain."

On cross-examination, plaintiff acknowledged that while her vision is not normal, it had "improved." Plaintiff also admitted that after she fell down the stairs on October 3, 1998, she filed a lawsuit against the owner of the house and gave deposition testimony in that case in which she denied that she was experiencing vision problems arising from the surgical procedure that was performed in December 1997. Plaintiff returned to work full-time at the post office from July 1998 until October 3, 1998, when she hurt herself after falling down the stairs. Plaintiff admitted that Dr. Zamorano did not give her a tumor or cause her to lose her vision or cause her to be off work since October 1998. Plaintiff also acknowledged that in her deposition in this case, she admitted that she fell down the stairs in October 1998 because a part of her dress or clothing got caught on the security gate as she was stepping through the gate onto a stair. According to plaintiff, "I'm not saying my vision actually had something to do with [the three car accidents and the fall down the stairs since the surgery], it just made me think that maybe my vision is not as good as I first thought it was." Plaintiff testified that Dr. Zamorano told her that her visual tremors, which happen about once a month or once every two months and last about "thirty to sixty seconds," were due to "swelling." Plaintiff admitted that her time off from the post office since her fall in October 1998 was not the result of her vision.

Plaintiff served a notice of intent to file a medical malpractice claim pursuant to MCL 600.2912b on defendants in December 1999. On May 17, 2000, plaintiff filed a complaint against defendants together with an affidavit of merit signed by Charles Miller, M.D., and alleged that defendants engaged in medical malpractice because they failed to get plaintiff's informed consent, that defendant Dr. Zamorano performed an improper surgical procedure that resulted in plaintiff needing a second surgery, that defendants failed to properly manage plaintiff's postsurgical pain, and that DMC's tumor board failed to adequately document its findings and recommendations with respect to plaintiff's tumor.

On August 3, 2001, the trial court held a hearing on defendants' motion to dismiss on the ground that plaintiff refused to allow defendants to depose Dr. Miller. Despite plaintiff's promise to produce Dr. Miller, she did not do so, and defendants brought another motion to strike Dr. Miller as an expert on December 14, 2001. The trial court informed defendants that Dr. Miller would be available in January 2002 for a deposition, and ordered that no discovery deposition would be permitted, and that the court would permit only a de benne esse deposition where plaintiffs and defendants were limited to forty-five minutes of questioning each.

Plaintiff's counsel received a letter dated January 2, 2002, from Dr. Miller, in which he stated that he was withdrawing from the case because he could no longer support the assertions he made in his affidavit of merit after he reviewed records related to the case, including plaintiff's deposition transcript. After defendants learned of Dr. Miller's withdrawal from the case, they filed a motion to dismiss plaintiff's claims for want of expert testimony, which the trial court heard on January 11, 2002. At the hearing, plaintiff requested an adjournment to

amend her witness list. The trial court gave plaintiff two months to obtain the services of a new expert witness, and ordered that each side would be limited to forty-five minutes of questioning in any deposition, and that only a de benne esse deposition could be taken.[3]

Plaintiff engaged the services of Leonard Rutberg, M.D., a neurosurgeon from San Diego, as her expert witness. At trial, Dr. Rutberg testified that, though he is an experienced neurosurgeon, and though the transphenoidal approach is commonly used for the removal of pituitary tumors such as the one plaintiff had, he never performed the transphenoidal procedure that Dr. Zamorano used to remove plaintiff's tumor. He also testified that he had never performed the gamma knife procedure, and admitted that he was not an expert in either stereotactic surgery or in the gamma knife procedure. Dr. Zamorano, on the other hand, had performed both procedures numerous times, had lectured extensively on the subject of the two procedures, and was chief of oncology and stereotactic surgery for DMC.

At a hearing the day before trial, the trial court heard defendants' motion to dismiss on the basis that Dr. Rutberg's responses to defendants' interrogatories were too vague, and that plaintiff failed to state a claim against Harper and DMC. The trial court denied defendants' motion and allowed plaintiff to amend her complaint to allow her to assert a claim that defendants had failed to properly manage her *pre*surgical pain. Defendants argued that neither plaintiff's complaint nor her affidavit of merit enumerated such a claim, while both documents did specifically assert a claim for failure to manage plaintiff's *post*surgical pain. The trial court nevertheless allowed plaintiff to amend her complaint, and held that the sentence that alleged that defendants "failed to properly treat" plaintiff could be construed as asserting the presurgical pain claim. The trial court also qualified Dr. Rutberg as an expert not only against Dr. Zamorano on plaintiff's improper surgery claim, but also as an expert on the standard of care for anesthesiology and the nursing standard of care, despite the fact that he had never administered anesthesia during such a procedure, and was not a specialist in that field.

At trial, Dr. Rutberg testified that he has performed at least thirty surgeries involving the removal of tumors during the course of his thirty-three years in general neurosurgical practice, but that he has never used the transphenoidal approach. Dr. Rutberg nevertheless testified that there was "no reason why a gross total removal could not have been carried out." Dr. Rutberg testified that while Dr. Zamorano "took some pressure off the optic nerve, off of the optic chiasm" and while plaintiff's vision had improved, "enough was not done." Dr. Rutberg further opined that plaintiff's complaints that she suffered from visual tremors and that her sight is cloudy and her ophthalmologist's observation that her sight is not as good as before, was related to part of the tumor that is still sticking up in the optic chiasm.

However, Dr. Rutberg stated that the surgery saved plaintiff's vision. He further testified that even if there had been total removal of the tumor, there was a chance of recurrence ranging "anywhere from five percent to thirty percent." Despite admittedly not being an expert in the

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[3] Though we need not address the issue of the forty-five-minute limitation in a de benne esse deposition, we note that in a medical malpractice case, where expert testimony is extremely important, the trial court's limitation is arbitrary and unfair to the parties.

procedure, Dr. Rutberg opined that radiation treatment using the gamma knife was dangerous when there were suprasellar extensions that are over by the optic chiasm because "you would be endangering the patient's vision by radiation spilling over into the optic chiasm as well as destroying the tumor, so you really have your hands tied." According to Dr. Rutberg, while Dr Zamorano is "a very highly trained, very admirable individual," she breached "the standard of practice" because "I just don't understand why a gross total removal was not carried out."

On cross-examination, Dr. Rutberg stated that if twenty percent of the tumor were left after the surgery, "that's too much" because "[t]hat is not a gross total removal." However, Dr. Rutberg acknowledged that "[i]f it gets down to that small an amount of tissue that you're not sure you're actually looking at tumor, then you are risking damage" and that it would wise to stop "[a]t that point, if it was such tiny bits."[4]

Dr. Zamorano, testifying as an adverse witness, testified that "[n]obody can remove [the capsule of this tumor] because "it is really the dura matter, the cover of the brain" and that if a surgeon removes the dura matter, he or she would expose the brain and subject the patient to meningitis. According to Dr. Zamorano, "[y]ou cannot do that, so all the transphenoidal surgeries, you will never remove the capsule" and that accordingly, some residual tumor will be left behind.

According to Dr. Zamorano, she removed about eighty percent of the tumor, and achieved the goal of decompressing the optic chiasm and restoring plaintiff's vision. Dr. Zamorano testified that "I took [out] all the tumor that I could see on the screen" and "[t]hat was exactly what I promised Mrs. Howard I would take as much tumor as I could take, as I could see." Dr. Zamorano further explained that using the transphenoidal approach, "[t]here's no way to see nerves" and that "you are just guessing where they are," and that even "with the help of the computer and image guider" a neurosurgeon cannot be completely certain because there is no way to see the optic chiasm.

Dr. Zamorano explained that the gamma knife technique may be used "to treat tumors [] up to four centimeters." Dr. Zamorano explained that before the surgery plaintiff was nearly blind in both eyes, and that she had "a complete loss of function of the right eye" because the tumor was compressing the optic nerve. Dr. Zamorano further testified that the gamma knife was not initially an option because the tumor was compressing the optic nerve.

Defendant presented the videotaped deposition testimony of Dr. Harris, who stated that after the surgery plaintiff told him that her vision was restored and that she was pleased. According to Dr. Harris' notes from an appointment with plaintiff on January 26, 1998, plaintiff reported no distress after the surgery and did not complain about her vision. Dr. Harris further testified that he discussed with plaintiff the options of having either gamma knife radiation or another transphenoidal type of surgery to remove the residual tumor, and that plaintiff refused "to have any more procedures done." Dr. Harris testified in November 1998 that he filled out

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[4] Indeed, a simple mathematical calculation reveals that twenty percent of a two centimeter tumor is approximately 0.4 centimeters, or 0.15 inches.

plaintiff's disability form stating that she was disabled from October 1998 to February 1999 as a result of falling down the stairs at a friend's house and sustaining "a compression fracture of the ninth thoracic vertebrae."

According to Dr. Harris, plaintiff was a "noncompliant patient" who did not always follow his recommendations and refused "repeat surgery [that] has been recommended by the majority of specialists" regarding the residual tumor. Dr. Harris testified that he terminated the patient-physician relationship with plaintiff when she became belligerent, hostile, and disrespectful because he refused to give her "unwarranted disability in a slip and fall case." Dr. Harris said that he referred plaintiff to an orthopedic surgeon and a neurologist regarding her disability claim, but nothing "significant was found that would warrant continued disability."

Defendant next called Dr. Alan deLotbiniere, a board-certified neurosurgeon at Yale University, who testified that he is the director of pituitary surgery at Yale, and that he uses the transphenoidal approach for removing pituitary tumors almost exclusively and that he has used gamma knife to treat pituitary tumors "on approximately 68 patients." Dr. deLotbiniere testified that one-third of his practice involves the removal of tumors. Dr. deLotbiniere further testified that the primary goal of the surgery was to "decompress the optic nerves" in the hope that plaintiff's vision could be saved or restored, while preserving "what is left of the normal pituitary gland." Dr. deLotbiniere explained that if a surgeon treated tumors such as plaintiff's too aggressively, it could result in nerve and arterial damage. Dr. deLotbiniere explained that it is not at all unusual for a residual amount of tumor to be left after similar surgeries. He further explained that "a complete removal very often leads to remnants left behind, which explains why tumors can come back, in some cases, even with complete removals." Dr. deLotbiniere opined that Dr. Zamorano's surgery was "a good standard of practice" because "a safe surgeon, one who is competent," will not aggressively attempt to remove "every bit of this tumor because he or she will run into trouble, and the patient will pay the consequences." Dr. deLotbiniere further opined that the surgery produced "an excellent result" because plaintiff's vision was restored and her pituitary function was preserved. According to Dr. deLotbiniere, if plaintiff had refused the surgery she would have been blinded, and that "the only reasonable thing to do was surgery." Dr. deLotbiniere also testified that plaintiff's surgery was urgent because documentation showed that her vision "was severely compromised."

Dr. deLotbiniere testified that there was enough space between the optic nerves to allow plaintiff's tumor "to be treated with a very focused, highly focused radiation which gamma knife is," and that "[g]amma knife could very easily handle this type of tumor."

II. STANDARDS OF REVIEW

We review a trial court's decision whether an expert witness is qualified for an abuse of discretion. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 72; 577 NW2d 150 (1998).

A trial court's decision with respect to a motion for JNOV is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). When we do so, we view the evidence in the light most favorable to the nonmoving party to determine whether "the evidence viewed in this light fails to establish a claim as a matter of law." *Id.*

III. ANALYSIS

To prove a medical malpractice claim, the plaintiff must establish the following elements: "(1) the applicable standard of care, (2) breach of that standard, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Weymers v Khera*, 454 Mich 639, 655; 563 NW2d 647 (1997). To establish causation, a plaintiff must show that without the defendants' actions, the plaintiff's injuries would not have happened. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). Circumstantial proof must facilitate reasonable inferences of causation to be acceptable and not amount to mere speculation. *Id*. at 164.

A. Informed Consent

Defendant argues that the trial court erred when it denied its motion for JNOV with respect to plaintiff's informed consent claim against Dr. Zamorano and UNA. Plaintiff claims that Dr. Zamorano failed to obtain her informed consent for surgery because Dr. Zamorano failed to tell plaintiff that there might be residual tumor fragments that required additional surgery.

The key question here is whether plaintiff would have withheld consent and forgone surgery had Dr. Zamorano supplied her with the allegedly withheld information. *Robins v Katz*, 151 Mich App 802, 811; 391 NW2d 495 (1986). As this Court has previously noted in *Robins*, case law is silent with respect to whether a subjective or objective test in such determinations is used:

> It is undisputed that a physician has a duty to warn a patient of the consequences of a medical procedure. *Lincoln v Gupta*, 142 Mich App 615, 625; 370 NW2d 312 (1985). However, no Michigan cases have been found which have analyzed whether the duty to disclose in a medical malpractice case should be tested by an "objective" or "subjective" standard. [*Id.* at 810.]

Ultimately, this Court held in *Robins* that the standard of review was not relevant to the case, and thus, it declined to rule on the matter. Here, too, we find it unnecessary to rule on the issue because plaintiff fails under *both* standards to establish that she would have forgone surgery had she received the information that was allegedly withheld from her.

The evidence here is undisputed that plaintiff was nearly blind as a result of the tumor. The evidence further suggests that plaintiff had only two choices: undergo surgery, or lose her vision. We conclude that when faced with a choice, as plaintiff was here, between blindness or surgery, a reasonably prudent patient would choose surgery.

Moreover, at trial, despite being asked whether she would have chosen not to undergo surgery had she been given the information she claims Dr. Zamorano withheld, plaintiff did not testify that she would have forgone surgery, or even whether she would have done anything differently at all. At best, plaintiff testified that she *might* have sought a second opinion.

Accordingly, we hold that the trial court should have granted defendants' motion for JNOV with respect to plaintiff's informed consent claim.

B. Plaintiff's Presurgical Pain Claim

Defendants assert that the trial court erred when it submitted plaintiff's presurgical pain claim to the jury, despite the fact that the affidavit of merit did not include such a claim, and that it erred when it allowed plaintiff to amend her complaint to include the claim the day before trial.

A plaintiff who wishes to file a complaint for medical malpractice must file an affidavit of merit signed by a physician who practices the same specialty as the defendant. MCL 600.2912d. A defective or "grossly nonconforming" affidavit does not meet the requirements of MCL 600.2912d. *Geralds v Munson Healthcare*, 259 Mich App 225, 240; 673 NW2d 792 (2003). An affidavit that does not contain statements concerning a claim that a plaintiff wishes to assert at trial is "grossly nonconforming" with respect to that claim, and the claim therefore cannot be asserted at trial. *Mouradian v Goldberg*, 256 Mich App 566, 573-574; 664 NW2d 805 (2003). Here, while plaintiff's affidavit was silent on the issue of any presurgical pain claims, it explicitly enumerated a *post*surgical pain claim. We disagree with the trial court that the general allegation that defendants "failed to properly treat" plaintiff is equivalent to establishing a presurgical pain claim; had plaintiff truly intended to encompass such a claim in that statement, plaintiff likely would not have felt the need to specifically assert a *post*surgical pain claim separately from the "failure to properly treat" assertion. Because plaintiff's affidavit of merit failed to enumerate a presurgical pain claim, the trial court erred when it submitted that claim to the jury, and it erred when it allowed plaintiff to amend her complaint to include the claim.

C. Plaintiff's Claim of Inadequate Documentation of Tumor Board Proceedings

Defendants also argue that Harper and DMC were entitled to JNOV based upon plaintiff's claim that they were liable for the tumor board's alleged negligence in failing to document its review allegedly in violation of JCAHO standards. As defendants point out, in *Wallace v Garden City Osteopathic Hosp*, 111 Mich App 212, 219; 314 NW2d 557 (1981), rev'd in part on other grounds 417 Mich 907 (1983), this Court held that there was "no basis to hold the hospital liable for the acts of the tumor board members" because "a hospital cannot be liable for the actions of a physician who is an independent contractor and merely uses the hospital facilities to render treatment to his patients." In this case, there was no evidence presented that Harper Hospital employed the members of the tumor board. Moreover, as Dr. Rutberg admitted, the JCAHO standard book did not address committee record keeping.

Moreover, plaintiff provided no evidence showing how the tumor board's alleged failure to document its review was connected with Dr. Zamorano's alleged malpractice. As this Court pointed out in *Haliw v Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001), to show causation, the plaintiff must demonstrate both cause-in-fact and proximate cause. Here, there is nothing in the record to show how the tumor board's failure to keep records established her claim of medical malpractice against Dr. Zamorano and UNA. As defendants correctly observe, "[p]laintiff failed to establish that, but for the lack of knowledge of the tumor board, her claimed injuries would not have occurred." Simply put, there is nothing that ties the tumor board's failure to keep adequate records to plaintiff's negligence claims against Dr. Zamorano and University Neurological Associates.

Thus, we conclude that defendants were entitled to JNOV with regard to plaintiff's claim that they were liable for the tumor board's alleged negligence in failing to document its review in violation of the JCAHO standards.

D. Plaintiff's Improper Surgery Claim

1. Dr. Rutberg's Qualifications as an Expert

Defendants argue, correctly, that the trial court abused its discretion when it qualified Dr. Rutberg as an expert witness against defendants on the subject of whether Dr. Zamorano performed improper surgery. MCL 600.2169 requires that when a defendant physician is a specialist, an expert whose testimony is offered against that defendant must have specialized in the same specialty at the time of the incident that is the basis for the malpractice action. It further states that if the defendant is a board-certified specialist, the specialist whose testimony is offered against the defendant must be board certified in the same specialty. MCL 600.2169.

Dr. Rutberg and Dr. Zamorano are both neurosurgeons. Though Dr. Rutberg is board certified in neurosurgery, Dr. Zamorano is not,[5] and thus the issue of board certification is not relevant in this case. Defendants maintain that plaintiff and the trial court erroneously believe that it is enough that Dr. Rutberg and Dr. Zamorano are both neurosurgeons. Defendants instead argue that because Dr. Zamorano further specializes in stereotactic surgery and the gamma knife procedure, any potential expert offered by plaintiff must also specialize in those procedures.

A specialist is "a medical practitioner who deals only with a particular class of diseases, conditions, patients, etc." *Decker v Flood*, 248 Mich App 75, 83; 638 NW2d 163 (2002), quoting *Random House Webster's College Dictionary* (1997) (internal quotation omitted). Here, while Dr. Zamorano is a neurosurgeon who specializes in stereotactic surgery and the gamma knife procedure, Dr. Rutberg, by his own admission, is a "general neurosurgeon" who has no experience whatsoever with either procedure. Indeed, in a telling admission, Dr. Rutberg conceded: "I don't hold myself out as an expert in stereotactic surgery [or] gamma knife." Nevertheless, the trial court permitted Dr. Rutberg to opine regarding Dr. Zamorano's performance of both procedures. In fact, with respect to the gamma knife procedure, Dr. Rutberg admitted that he was "not an expert in that," and that when a "tumor is near the optic chiasm, that's certainly when I would defer to an expert in gamma knife." Defendants, on the other hand, presented the testimony of Dr. deLotbiniere, who, like Dr. Zamorano, is a neurosurgeon who has extensive experience in both procedures.

The intent of MCL 600.2169 is that "the qualifications of a purported expert match the qualifications of the defendant against whom that expert intends to testify." *Decker*, *supra* at 85, citing *Greathouse v Rhodes*, 242 Mich App 221, 231; 618 NW2d 106 (2000) rev'd in part on other grounds 465 Mich 885 (2001). Here, by Dr. Rutberg's own admission at trial, his qualifications do not match Dr. Zamorano's, save for the fact that both are neurosurgeons.

[5] Dr. Zamorano received her medical training outside the United States, and practiced, taught, and lectured for many years before she came to this country to practice. To be board certified in neurosurgery in the United States, one must complete a residency in neurosurgery in the United States; however, due to her extensive experience outside the United States, Dr. Zamorano was vastly overqualified for a residency, which is typically intended for those who have no experience whatsoever in a given specialty.

Despite the fact that Dr. Rutberg repeatedly stated that he was not an expert in the procedures Dr. Zamorano performed (or intended to perform), the trial court erroneously allowed him to pass judgment on the propriety of Dr. Zamorano's actions. However, we do not rest our opinion on this issue under MCL 600.2169.

That is, were we to conclude that Dr. Rutberg met the requirements of MCL 600.2169, we would nevertheless conclude, pursuant to MRE 702,[6] that the trial court should have excluded Dr. Rutberg's testimony because, by his own testimony, he lacked the "knowledge, skill, experience, training, or education" to properly testify with respect to Dr. Zamorano's conduct. As Dr. Rutberg testified, he had never performed the procedures employed by Dr. Zamorano, and was not an expert in either procedure. We hold that MRE 702 provides the trial court with the discretion to exclude proffered expert testimony quite apart from the requirements of MCL 600.2169. Indeed, subsection (3) of the statute provides that "This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section." And, where as here, the expert admits that he has no experience whatsoever with either procedure in issue (stereostatic surgery and gamma knife procedure) and further admits that he is not an expert in these procedures, the trial court clearly abused its discretion in allowing the proffered expert witness testimony under MRE 702.[7]

We hold, therefore, that the trial court abused its discretion when it qualified Dr. Rutberg as an expert against Dr. Zamorano, and that plaintiff's case should be dismissed because she failed to introduce the necessary expert testimony to support this malpractice claim.

2. Defendants' Motion for JNOV

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[6] MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[7] In *Meyers v Ciullo*, unpublished opinion per curiam of the Court of Appeals, issued December 10, 1999, which we find to be instructive here, this Court, noting subsection (3), held that an expert witness was properly disqualified under MRE 702 regardless of whether he met the qualifications of MCL 600.2169. In *Meyers*, both the defendant and the expert were specialists in orthopedic surgery, but the expert witness had no experience whatsoever with the procedure performed by the defendant that was at issue in that case. This Court stated that the expert witness was properly excluded under MRE 702 "an unprejudiced person would have serious reservations as to whether [the expert witness] was sufficiently qualified by knowledge, skill, experience, training or education, to provide expert testimony as to the standard of care applicable to [the defendant] in the performance of the procedure in question" because, as here, the expert witness "lacked significant familiarity with the procedure at issue."

Defendant argues, correctly, that the trial court erred when it denied defendants' motion for JNOV because Dr. Rutberg was not a properly qualified expert witness. In response, plaintiff asserts that the proper remedy in such a case is remand for a new trial, and cites *Tennyson v Botsford Hosp Group, Inc*, 469 Mich 1021; 679 NW2d 67 (2004), in support of her position. And, though it is true that in *Tennyson*, our Supreme Court[8] reversed this Court's opinion that reversed the trial court and entered judgment in the defendant's favor, the Court did so because there was other credible evidence to support the plaintiff's claim. *Id.* Here, on the other hand, aside from the improperly introduced testimony of Dr. Rutberg, there is simply no expert testimony to support plaintiff's claim. And, because expert testimony is necessary to maintain a medical malpractice claim, *Birmingham v Vance*, 208 Mich App 418, 421; 516 NW2d 95 (1994), plaintiff's case must be dismissed.

Accordingly, we hold that the trial court erred when it denied Dr. Zamorano's motion for JNOV.

IV. CONCLUSION

We reverse the judgment of the trial court, and remand for entry of judgment in favor of defendants with respect to all of plaintiff's claims.[9] We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Michael J. Talbot
/s/ Stephen L. Borrello

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[8] In lieu of granting leave to appeal, the Court entered an order that reversed this Court's opinion. "An order that is a final Supreme Court disposition of an application and that contains a concise statement of the applicable facts and reasons for the decision is binding precedent." *Dykes v William Beaumont Hosp*, 246 Mich App 471; 633 NW2d 440 (2001).

[9] Because we have reached this result, we decline to address defendant's remaining issues on appeal.